LOKE SENG SEONG

v.

WALDORF HOTEL SDN BHD

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
[COMPANIES (WINDING-UP) NO: 28-37-95]
26 SEPTEMBER 1996

COMPANY LAW: *Winding-up - Just and equitable rule - Whether petitioner had been unfairly removed from board of directors - Whether petitioner had right to hold on to post of director and treasurer - Whether there was understanding to that effect - Companies Act 1965, s. 218(1)(i)*

The petitioner brought an action to wind up the respondent company pursuant to s. 218(1)(i) of the Companies Act 1965 ('the Act') under the just and equitable rule. He alleged, *inter alia,* that: (i) the Waldorf Hotel had been run under a partnership, of which he was one of the partners, and which was later incorporated as the respondent company; (ii) the company had been formed or continued on the basis of personal relationship involving mutual confidence; (iii) he had been a director and treasurer of the company since its incorporation in 1978; and (iv) there was an agreement or understanding that the former partners should participate in the conduct of the business of the company and therefore he had a right to remain as director and treasurer. The petitioner alleged that he was, however, removed from the two posts of director and treasurer at the company's 15th Annual General Meeting in 1994, and claimed that as a result, the agreement or understanding had been 'trampled' thus putting an end to all mutual trust and confidence. In the circumstances, he claimed that it would be just and equitable to wind up the company based on the principles in *Ebrahimi v. Westbourne Galleries Ltd & Ors.* The issues before the court were: (i) whether there was a pre-existing partnership prior to the formation of the company; (ii) whether there was an understanding that all former partners should continue in the conduct of the business of the company.

Held:

[1] A court is clearly not in a position to make definite findings of facts based on affidavit evidence, if those facts are in dispute. However, where a fact is clear from contemporary documentary evidence, the court would be in a position to make a finding and will do so.

[2] The documentary and other evidence, ie, the Form B (Registration of Changes in Business) and the Deed of Partnership, both dated 6 November 1968, clearly showed that there was a partnership known as Waldorf Hotel since 11 April 1951 and that the respondent company was an evolution from that partnership. The partners became shareholders of the company and all the partners, except one, became directors of the company soon after its incorporation.

[3] The company's articles of association provided for the retirement, rotation and re-election of the directors and the evidence showed that over the years, the directors had changed in number and persons. The petitioner had remained a director and treasurer because he had been re-elected at the annual general meetings, which had the power to do so, and not because the petitioner had the right to hold on to the said posts. As such, this was not a proper case for the court to exercise its power to wind up the company on the just and equitable ground under s. 218(1)(i) of the Act.

[Petition dismissed.]

Cases referred to:
Chong Choon Chai v. Tan Gee Cheng & Anor [1993] 3 SLR 1 ***(cit)***
Chua Kien How v. Goodwealth Trading Pte Ltd & Anor [1992] 2 SLR 296 ***(cit)***
Ebrahimi v. Westbourne Galleries Ltd & Others [1973] AC 360 ***(dist)***
In the Matter of Tahansan Sdn Bhd [1984] 1 MLJ 204 ***(cit)***
Re Goodwealth Trading Pte Ltd [1991] 2 CLJ 1648 ***(cit)***
Re Lo Siong Fong [1994] 2 MLJ 72 ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1984] 2 CLJ 224 ***(cit)***

Legislation referred to:
Companies Act 1965, s. 218(1)(i)

For the petitioner - Ooi Teik Hoe; M/s Ooi Lee & Co
For the respondent - Karin Lim Ai Ching; M/s Presgrave & Matthews

Reported by Anne Khoo

JUDGMENT

Abdul Hamid Mohamad J:

This is a petition to wind up the respondent company. According to the petitioner, the respondent company was formed or continued on the basis of personal relationship involving mutual confidence. There was a pre-existing partnership known as Waldorf Hotel which was subsequently converted into a limited company, the respondent company. There were 5 original partners.

Until 21 October 1994 the petitioner was a Director and Treasurer of the company. However, at the 15th Annual General Meeting held on 21 October 1994, he was removed, as Director and Treasurer of the company. According to him the two positions were held by him since the incorporation of the company on 21 September 1978. At a meeting of the Board of Directors held on 3 December 1994 the then Managing Director and Assistant Managing Director of the company were also removed. He claimed that as a result, the original agreement or understanding that former partners of the hotel, including the petitioner, should participate in the conduct of the business of the company had been "trampled" thus putting to an end all mutual trust and confidence, The affairs of the company are now being dominated by five named persons – see para. 7. These five persons continue to run and manage the affairs of the company as though the petitioner is of no consequence. In the circumstances that it would be just and equitable to wind up the company under s. 218(1)(i) of the Companies Act 1965.

A number of affidavits were filed by both partners, I shall refer to them when I deal with the issues arising.

Both parties did not lead any oral evidence but chose to argue the case on affidavit evidence. There is no doubt that some facts are in dispute. This court is clearly not in a position to make definite findings of facts based on affidavit evidence if those facts are in dispute. However, where a fact is clear from contemporary documentary evidence, the court is in a position to make a finding and will do so.

It is clear that the petitioner is relying on the principles in *Ebrahimi v. Westbourne Galleries Ltd. & Others* [1973] AC 360.

But first, let me make some findings of facts, so far as I can, considering the constraints I have mentioned earlier.

First, was there a pre-existing partnership prior to the formation of the company?

In spite of what the disputing parties say in their affidavits, two early documents speak for themselves. They are Form B (Registration of Changes in Business) and the Deed of Partnership, both dated 6 November 1968. The first document, Form B, states the business name as "Waldorf Hotel", constitution of business as "partnership" and the date of commencement as "11 April 1951". There is a column which says "state whether there is a written agreement as to the term of the partnership. If so, give date and attach a copy of the agreement verified by signatures." Against this column the entry

is "Partnership Agreement dated 6 November 1968 attached." Eight persons were given as partners. One of them is the petitioner.

I shall now refer to the Deed of Partnership. It is pertinent to note that the persons who executed this Deed of Partnership were the eight partners mentioned in Form B earlier. The recital, *inter alia*, says, "The Partnership business though commenced on 11 April 1951 was not governed by any Deed of Partnership and in order to remedy this defect the partners hereto agreed to enter into a Deed of Partnership which shall replaces (*sic*) previous arrangements made between themselves."

Clause 1 says,

> 1. The Partnership shall commence on 11th day of April 1951 and shall continue until determined by the Partners in the manner set out below:

Clause 5 stipulates the shareholding of the eight partners. Clause 9 established a "shareholders council" consisting of all partners which "shall be the final policy and decision body in the partnership business." Clause 23 says: "The immovable property of the partnership firm has been registered and held in trust for the partners in the name of the following partners who shall constitute the trustees of the firm..."

In fact they were the same eight partners.

This document is a lengthy and detailed document consisting of 19 type-written pages. I do not think I need reproduce any more of its contents.

It is very clear that there was a partnership known as "Waldorf Hotel" since l1 April 1951. But it is not known how many original partners were there in 1951. The petitioner in his Petition says there were five. That may be so. However by 6 November 1968 there were eight.

It is also very clear that this Deed of Partnership was executed some 17 years after the partnership commenced. Yet the partners appear to try to give it a retrospective effect, through cl. 1. Anyway that does not concern us here.

Next, it is also clear from the report in the Malaysian Nanyang Siang Pau Newspaper dated 30 November 1968 that a new building was opened. It is not difficult to appreciate that the Deed of Partnership executed about three weeks earlier was thought to be necessary because of the construction of the new building.

Another important event happened 10 years later. This was on 21 September 1978. A company known as "Waldorf Hotel Sdn. Bhd." was incorporated. Two persons were stated in the Memorandum of Association as subscribers. They were Loke Beo Seng and Loke Gim Seng, two of the eight partners but the petitioner was not one of them. They were also the first two directors.

The First Directors' Meeting was held on 16 October 1978. The meeting was attended by the two directors. At the meeting one share each was allotted to them.

Only about one month later, on 26 November 1978 another Board of Directors' Meeting was held. Among the resolutions passed were, first, concerning allotment of shares. Shares totalling 9,998 were allotted to the same eight previous partners. It is interesting to note that the total number of shares (9,998) plus the two shares earlier allotted to the first two subscribers total 10,000. It is also interesting to note that the number of shares now allotted to the two subscribers were 1,249 each, whereas to the others were 1,250, 1,000 and 2,500 each, all the latter in round figures. Clearly the allotment to the two subscribers took into account the one share each earlier allotted to the two of them, which would make the total of 1,250 (1,249 + 1 = 1,250) each, just like the other two.

That meeting also resolved that five of the former partners be appointed directors in addition to the existing two. The petitioner was one of them. A resolution appointing the Chairman, Managing Director, Assistant Managing Director, Treasurer and Assistant Treasurer was also passed. The petitioner was elected Treasurer. Another resolution passed was for the opening of a bank account and the signatories thereof. Again the petitioner was one of them.

Another important resolution pursuant to Art. 127 of the Articles of Association of the company is also very important. It authorises the "company's land" with premises to be charged to Chung Khiaw Bank Limited. This land and premises was no other than the property of the Partnership mentioned in the Deed of Partnership.

Perhaps I should pause here for a while. From the chain of events contained in the undisputed documents, it is very clear that since 1951 there was a Partnership business called Waldorf Hotel. The petitioner was one of the partners. The Partnership was transformed into a limited company called Waldorf Hotel Sdn. Bhd.. The partnership property was transferred to the company. The same partners became shareholders. The partners, except for one (Loh Heng San @ Loh Heng Kim, I do not know what had happened to him) were made directors very soon after the incorporation of the company. They were also elected to hold various posts in the company.

So, it is very clear to me that there was a partnership prior to the incorporation of the company and that the company was an evolution from the partnership. It is a distinct legal entity now no doubt but it is not right to say that it had nothing to do with the partnership.

Next I must consider whether there was an understanding that all former partners should continue to participate in the conduct of the business of the company.

From the facts so far narrated it appears to be so. Indeed that is the most sensible conclusion one can make. Which partner wants to be left out in the lurch after the company was incorporated and the partnership property, the only one it appears, transferred to the company? But was it envisaged that the company was to remain as it was immediately after incorporation in terms of shareholding and involvement in the management of the company? We should bear in mind that the petitioner says that he was a director and Treasurer since the incorporation until 1994 when he was removed. His contention is that he has a right to remain in those posts, I suppose, so long as the company exists and he is alive.

Let us go back to the documents of the company, which undoubtedly, are more reliable than what the parties, after the dispute has arisen, swear in their respective affidavits,

First the Articles of Association of the company.

Articles 110, 111 and 112 are important, I reproduce them here:

> 110. At every ordinary general meeting one-third of the Directors (except a Managing Director) or if their number is not a multiple of three then the number nearest to one-third shall retire from office.
>
> 111. The Directors to retire in every year shall subject nevertheless as hereinafter provided be the Directors who have been longest in office since their last election but as between persons who became Directors on the same day, the Directors to retire shall unless they otherwise agree among themselves be determined by lot.
>
> 112. A retiring Director shall be eligible for re-election.

These provisions speak for themselves.

Then, according to Form 49 exhibited by the respondent, dated 18 January 1979, there appears to be further change of directors. There were five now instead of seven elected about two months earlier.

a The next document is the Minutes of the Second Annual General Meeting held on 7 June 1981. Ten members attended, which clearly means that there were 10 shareholders by then. The meeting, among other things, also passed a resolution re-electing the retiring directors, including the petitioner.

b There was another Annual General Meeting the following year, held on 9 July 1982. The same members attended. Two retiring directors were re-elected.

The next relevant document is the Minutes of the Adjourned General Meeting held on 29 July 1986. The attendance list shows 17 names. In other words the shareholders had expanded further.

c A resolution pursuant to Art. 127 dated 30 May 1986 shows that there were then seven directors, instead of five contained in Form 49 dated 18 January 1979, referred to earlier: Loke Beo Seng who was one of the two directors when the company was incorporated was no longer a director. There were three new faces.

d There is another resolution dated 27 October 1988. Now Loke Heng Kang's name disappeared. Instead Loke Heh Leong had come in.

The position remained the same in 1990 as shown by the resolution dated l0 August 1990.

e Attendance list of the 11th Annual General Meeting held on 29 August 1990 shows 17 persons attended. Again the Minutes show that two retiring directors were re-elected.

f Another resolution dated 12 August 1991 shows a further change of directors. Now Chua Teik Khim had entered, apparently in place of Loke Yeok Hong.

We now come to the 12th Annual General Meeting on 30 August 1991. Again there was re-election of two retiring directors, one of them was the petitioner.

g Another resolution dated 24 February 1993 shows a further change. Loh Geok Hong was replaced by Chuah Teik Khim.

The next important document is the list of shareholders as on 21 October 1994, the date of the fateful Annual General Meeting. There were 25 altogether, the number of shares totalling 400,008, as compared to eight shareholders with
h share totalling 10,000 soon after the company was incorporated.

The next document available is the fateful 15th Annual General Meeting on 21 October 1994. One of the purposes of the meeting was to re-elect the petitioner who was retiring as director. He was also still the Treasurer. The

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minutes show there was some dissatisfaction with the way the petitioner was handling the finances of the company. Then there was an election. There was a tie, 7 for and 7 against and the Chairman was entitled to a casting vote. The remarks by the Chairman before he exercised his casting vote against the petitioner is interesting, I reproduce it here:

> The Chairman informed the members that Mr. Loke Seng Seong is one of the founders of the company and that he had been with the company for a considerable period of time. He suggested that a gratuity be paid to Mr. Loke Seng Seong in consideration of his past support, to which the members agreed. The amount of gratuity is to be decided by the Board. Thereafter the Chairman cast his vote against the re-election of Mr. Loke Seng Seong as a director and treasurer. Accordingly, Mr. Loke Seng Seong was not re-elected as a director and treasurer as there was only seven (7) votes in his favour and eight (8) votes against his re-election.

From these facts it is clear that the company, over the years had not remained static regarding the shareholding or directors. Regarding the directors, the Articles of Association of the company provided for retirement, rotation and re-election of the directors. Directors had changed in number and in persons. True that until 1994, the petitioner had remained a director and treasurer. But that was because he was re-elected at the Annual General Meetings. The Annual General Meeting has power to re-elect. It also has power not to re-elect any director.

Let me now revert the principles in *Ebrahimi's* case [1973] AC 360.

First, important facts of that case must be stated in order to appreciate the judgment. The appellant and N were partners in business since 1945. In 1958 a private company was formed to take the business over. The appellant and N were its first directors. Soon afterwards, N's son G was made a director. By virtue of their shareholding N and his son, G, had a majority of votes in general meeting. In 1969 after disagreements between the appellant and N and his son G, an ordinary resolution was passed by the company in the General Meeting by the votes of N and his son, G, removing the appellant as director. It was under those circumstances that the House of Lords held, *inter alia*:

> that ... the appellant and N had joined in the formation of the company on the basis that the character of the association, *viz*, *inter alia*, that the appellant was entitled to participate in the management, would, as a matter of personal relation and good faith, remain the same; and that, N having in effect repudiated that relationship and the appellant having lost his right to a share in the profits and being in that respect at the mercy of N and G and being unable to dispose of his interest without their consent, the proper course was to dissolve the association by winding up the company.

Lord Wilberforce in his judgment said at p. 379:

> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

Perhaps I should refer to some of the cases cited to me for guidance. *Re Lo Siong Fong* [1994] 2 MLJ 72, is a case where "The relationship had been altered beyond recognition and that the quasi partnership had remetamorphosed to being an incorporated company not only in name but in fact as well." V.C. George J (as he then was) set aside the appointment of the provisional liquidator and ordered a permanent stay of the petition.

I shall only mention a few other local and Singapore cases where the principle in *Ebrahimi*'s case was applied or sought to be applied. The principle is not in dispute, not even in this case. The dispute, in all cases, is whether it is applicable on the facts of that particular case. The cases are, *Re Goodwealth Trading Pte. Ltd* [1991] 2 MLJ 314; *In the Matter of Tahansan Sdn. Bhd.* [1984] 1 MLJ 204; *Chong Choon Chai v. Tan Gee Cheng & Anor.* [1993] 3 SLR 1; *Chua Kien How v. Goodwealth Trading Pte. Ltd. & Anor.* [1992] 2 SLR 296, *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ 433 PC.

I do not think on the facts of this case the principle is applicable. No doubt the business started as a partnership since 1951. According to the Petition there were five original partners. That may be so. By the time the Deed of Partnership was drawn up 17 years later there were already eight. Since the company was incorporated, the shareholding had changed, the number of shareholders had increased, the directors kept changing. True also that the petitioner had remained a shareholder, a director and treasurer until 1994. But I do not think that he has a right to hold the posts of director and treasurer so long as he lives and/or the company is in existence, and that if he goes the company should go too.

The Articles of Association clearly provides for rotation, retirement and re-election of directors. He had been re-elected until 1994. But that does not mean that the members had no choice but to re-elect him every time he is deemed to retire.

The petitioner alleged in his petition that he "was removed as Director and Treasurer of the company." But the minutes of the Annual General Meeting shows otherwise. There was a voting, there was a tie and the Chairman, after recognising the petitioners' involvement in the company and suggesting a gratuity be paid to him, exercised his casting vote against the petitioner. This is very different from what happened in *Ebrahimi*'s case.

In any event, it is for the petitioner to prove his allegation. He chose to rely only on affidavit evidence. He has clearly not proved it.

The petitioner also tried to challenge the validity of the voting, in particular the use of proxy. This is not a matter which this court can make a definite finding based on contradictory affidavit evidence. In short, it is not proved.

The petitioner has also failed to prove that there was a breakdown of mutual trust arising from impropriety of management of the company that led to the destruction of mutual confidence as in *Ebrahimi*'s case. On the other hand the income statement for the years 1994 and 1995 show that the company made a fair profit. The petitioner's dissatisfaction appears to have arisen because he was not re-elected to the posts of Director and Treasurer, as some of the shareholders were not happy with his management of the company's finance. I make no definite finding of facts about the allegation of misconduct against the petitioner as I do not and should not do so on affidavit evidence alone.

In conclusion, I am of the view that this is not a proper case for this court to exercise its power to wind up the company on just and equitable ground under s. 218(1)(i) of the Companies Act 1965. I dismissed the petition with costs.